

A Matter of Pragmatism rather than Principle

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2021-12-30T11:04:23

Not only in Hungary the current opposition could soon face the dilemma to uphold the principles of the rule of law while trying to restore democratic government as fast as possible and under difficult conditions. In many countries, the necessary transition to a democratic constitutional system could be done more easily if the prevailing constitutional and ordinary law inherited from an authoritarian regime were overthrown altogether. This blog post applies the core question discussed [in this blog debate](#), namely how to use inclusive democratic decision-making mechanisms in order to restore Constitutionalism (with a big C) despite the resistance from the supporters of the authoritarian regime still present in the political institutions, to the Turkish case. Hopefully, this question might soon become very real and very urgent in Turkey. After two decades under the rule of the AKP government and Recep Tayyip Erdoğan, the country finally seems to be at the verge of a transition of power. Once post-Erdoğan times have come, a new (monist) government and a new parliamentary majority will face the tricky task to operate within the rules set for an authoritarian regime while trying to change those rules as soon as possible. The way how this challenge can best be met is a matter of legitimacy as much as a choice between principles and pragmatism. We argue that even in post-Erdoğan Turkey, probably no window of opportunity for an inclusive, deliberative constitution-making process will occur in the foreseeable future. Therefore, a pragmatic, piecemeal way forward, restoring at least basic principles of a state under the rule of law and reconciling society around a common understanding of some fundamental democratic values is more promising than a principled textbook approach of (re-)institutionalizing liberal Constitutionalism from scratch.

Sealing the Autocratic Regime

The consolidation of authoritarian power in current Turkey has been a relatively slow and gradual process.¹⁾ See for the cornerstones of this process, Göztepe, Ece: *How to Lose a War through Small Defeats: The Case of Turkey's Democratic Backsliding*, Social Research: An International Quarterly, Vo. 88, No. 2 (2021), pp. 413-443. During the first phase of AKP rule, comprehensive legal reforms, culminating in several constitutional amendment packages, have even created temporal progress towards a rights-centered state under the rule of law. Since the late 2000s, however, opposite dynamics set in. With the 2017 constitutional amendments, which grafted a hypertrophic presidency onto the traditional parliamentary system, the autocratic regime was sealed. The "Presidentialism à la Turka"²⁾ See von Steinsdorff, Silvia: *Presidentialism à la Turka or what? The (missing) logic behind the constitutional amendments*, VerfBlog, 2017/2/13, <https://verfassungsblog.de/presidentialism-a-la-turka-or-what-the-missing-logic-behind-the-constitutional->

amendments/, DOI: [10.17176/20170214-095137](https://doi.org/10.17176/20170214-095137). was tailored to the political survival of the ruling party and its leader. It brought a massive concentration of executive power in the hands of the state president and significantly weakened all constitutional counterweights. The amendments were prepared without any meaningful debate in parliament, let alone a wider public deliberation, and they were enacted by a referendum under state of emergency conditions. The ultimate aim of this constitutional reform was to perpetuate the unlimited powers Erdoğan enjoyed during the state of emergency following the failed coup attempt of July 2016.

Once Erdoğan will have been forced to leave his presidential palace by electoral defeat, two scenarios are imaginable: Either the new political majority will be strong enough to immediately amend the Constitution and even start a new constitution making process, or – much more likely – it will not have such a comfortable two-thirds majority and hence will have to manage the necessary transition in a more piecemeal and pragmatic manner.

The Case Against Exclusion

Even if a constitutional majority supported a fundamental reset of Turkish politics, this process might be less smooth than one might expect. Polarization has long since been one of the main problems of Turkish politics, and the populist Erdoğan regime has deliberately deepened the societal divide. Besides, the long experience of authoritarian rule in the country has shown that it is not only a narrow elite that profits from its closeness to the autocratic structures, but a wide range of voters benefits from them in one way or another. Consequently, an important part of society, particularly influential in the bureaucracy and other key positions of the state apparatus, might continue to support the old regime even beyond its fall. As it is always the case after revolutions, military coups or a long period of authoritarian rule, all victims of the old regime and supporters of the new system will have to live, talk and negotiate with their torturers, desecrators, power abusers or political enemies. Once again excluding part of the society during the re-democratization process would foster the development of an oppositional narrative based on this exclusion, and thus undermine the democratic legitimacy of the renewed system from the beginning, as Turkish history shows.

After the 1960 coup d'état in Turkey, the representatives of the overthrown government were prevented from participating in the constitution-making process, which resulted in a low acceptance rate of the new 1961 Constitution (only 61.7% approval rate at the referendum) and ultimately contributed to its relatively short life: Only a decade after its ratification, in the wake of the 1971 military coup, significant authoritarian amendments were made, and after the 1980 coup d'état, its basic liberal philosophy was abandoned altogether. The 1982 Constitution, which was more or less octroyed by the putschists, bore a partially authoritarian character. While it was gradually liberalized by a series of substantial amendments until the early 2000s, the need for a democratic constitution-making process was widely accepted as a fundamental step towards the establishment of a long-term sustainable democratic system in Turkey.

When this process was finally started in 2011, however, the challenges of an inclusive, deliberative and open-ended constitution-making became quickly obvious. The Constitutional Reconciliation Committee, which was formed in the Parliament between 2011 and 2013 from all parliamentary parties regardless of their number of seats, set very inclusive working principles for itself. Any proposal to the General Assembly had to be unanimously approved, and no minimum standards of the future constitution were stipulated ex-ante.³⁾ See the many contributions in Felix Petersen/ Zeynep Yana#mayan (Eds.), *The Failure of Popular Constitution Making in Turkey. Regressing Towards Constitutional Autocracy*, Cambridge UP, 2020. Open public meetings were held in almost every city in Turkey, where a huge amount of partially contradictory and sometimes openly anti-democratic demands were collected, including claims to abandon secularism or gender equality altogether and to apply Sharia provisions in private law cases. Even though this constitution-making process came to grief mainly because of AKP's unwillingness to compromise, the lack of a preestablished consensus on basic democratic principles also contributed to its failure. If a future political majority will support the re-establishment of constitutional democracy in Turkey by means of substantial constitutional amendments or even the adoption of an entirely new fundamental law, the process should well be a matter of a large public debate instead of being limited to parliamentary decision-making. But it is equally important that all involved parties first agree on minimum democratic standards and sign a memorandum of understanding to this effect. The current constitution-making process in Chile, where the majority of political parties signed an "Agreement for Social Peace and a New Constitution" stipulating the main principles and minimum standards of the new basic law, could serve as an example in this regard.

A Risk Worth Taking

According to the second, more realistic scenario, the first post-Erdo#an government will not have the luxury of a constitutional majority. Under these circumstances, its priority should lie on the immediate revision of the many ordinary laws which impeded democratic opposition to the authoritarian regime. These stretch from unfair election rules to all sorts of legal restraints imposed on the freedom of assembly and association as well as other individual rights. The abolition of any legal restrictions to a free and pluralist political discourse would quickly and substantially increase the legitimacy of the democratic restoration process. The risk that the supporters of the Erdo#an regime will equally profit from this general liberalization must be taken, because otherwise, the former authoritarian rule would just be replaced by another form of illiberal regime, suppressing part of the political spectrum. Even if such an approach might facilitate the initial democratic transition, it would undermine its democratic legitimacy in the mid and long term. The new majority would perpetuate the divisive political strategy of its authoritarian predecessors, creating new enemies and providing the breeding ground for new political victimization narratives.

For the same reasons, radical and undifferentiated political purges may endanger the long-term stability and resilience of the restored democratic order. Understandably enough, the experience of arbitrary mass repressions against

various professional groups after the attempted 2016 coup could induce a 'retaliation' by similar means. It is therefore all the more important that every decision about dismissal, retirement or transfer as well as criminal prosecution of representatives of the authoritarian state apparatus will be based on clearly defined criteria, respecting the principles of a state under the rule of law. Among other things, each administrative act must be personalized and open to judicial review. In this respect, the lustration procedures applied to all branches of public service after the reunification of Germany might serve as guideline for similar attempts in Turkey. In the judiciary, for example, the vetting process took place on an individual level, evaluating each case by a comparison of legal competences and personal decisions. Besides, all lustration measures could be contested before administrative courts. Such a process is obviously time-consuming and laborious, but the establishment of a long-lasting democratic system based on the rule of law inevitably needs time. The proper training of the staff in charge of this process is crucial.

Perhaps the most important precondition for a successful, sustainable restoration of liberal democracy in Turkey, particularly in the absence of decisive constitutional changes, concerns the individual behavior of the new political office-holders. Under the perpetuation of the incoherent state structure introduced with a constitutional referendum in 2017, characterized by the authoritarian logic of *executive aggrandizement*,⁴⁾ Nancy Bermeo: *On Democratic Backsliding*, Journal of Democracy, Vol. 27. No. 1 (2016), pp. 5-19. the newly elected state president and other government officials will possess almost unchecked competences. Will they be willing and able to restrain themselves in the use of these powers in order to restore democratic checks and balances, even without the existence of respective constitutional restrictions? At this point, an informal agreement between all involved actors, supplementing the respective constitutional provisions, might be helpful. For example, the new (democratic) state president could copy from the French example of cohabitation, where the head of state renounces the use of some of his competences in respect of a changed political majority in the National Assembly. In the Turkish case, this form of political self-effacement could also be applied to the important field of judicial appointments. Regardless of the president's unlimited constitutional rights, a more transparent and inclusive procedure, emphasizing professionally justifiable reasons for the appointment decision, would help to restore trust in the independence of the judiciary.

In this regard, the Constitutional Court (CCT) plays a particularly sensitive role. While the legal basis of ordinary judges' and prosecutors' activities can be changed by simple parliamentary majority, the competences and the appointment procedures of the CCT are directly determined by the Constitution. Consequently, its decisions, based on the 2017 version of the Constitution, could be hanging like the sword of Damocles over any attempts at re-establishing the rule of law in Turkey. Unless immediate constitutional amendments will be possible, anyway, constitutional review of the autocratic abuse of state functions by members of the Erdoğan-regime is no option. Much will therefore depend on the willingness of the constitutional justices, mostly appointed from a pro-Erdoğan background, to accommodate the new political majority by judicial self-restraint. Otherwise, a transparent political debate about the obstructive strategy of the CCT, publicly disclosing possible blockades of legal

reform or other liberalization measures, will be the only legitimate reaction of a post-Erdogan majority.

Towards Gradual Change

Summing up the briefly outlined re-democratization scenarios in Turkey for the foreseeable future, the rapid restoration – or, even better, renovation – of the Constitution will probably play only a secondary role. Whereas the 2017 amendments definitely present a handicap to any well-functioning state under the rule of law, based on a system of constitutional checks and balances, the necessary political majority for an immediate constitutional ‘repair’ seems unlikely. As sketched out, however, much of the authoritarian heritage can and should be disposed of on a sub-constitutional level. Taking into consideration that the backsliding of Turkish democracy during the last ten to fifteen years happened in a piecemeal and often erratic way, only partially based on constitutional amendments, the reverse process should also be possible by gradual legal and, eventually, constitutional changes. Political pragmatism, based on a clear commitment to basic democratic values and societal reconciliation, might be more important for the sustainable recovery of Turkish democracy than a radical constitutional restart.

References

- See for the cornerstones of this process, Göztepe, Ece: How to Lose a War through Small Defeats: The Case of Turkey’s Democratic Backsliding, *Social Research: An International Quarterly*, Vol. 88, No. 2 (2021), pp. 413-443.
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